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Rec # 6142-11

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN

NATIONAL WILDLIFE FEDERATION; and  
LONE TREE COUNCIL,

Plaintiffs,

vs.

STEPHEN L. JOHNSON, in his official capacity as )  
Administrator of the United States Environmental )  
Protection Agency; BHARAT MATHUR, in his )  
official capacity as Acting Regional Administrator )  
of the United States Environmental Protection )  
Agency, Region 5; and UNITED STATES )  
ENVIRONMENTAL PROTECTION AGENCY, )

Defendants.

06-12423

CASE NO.

COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF

DAVID M. LAWSON

JUDGE

MAGISTRATE JUDGE

U.S. DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
ANN ARBOR  
2006 MAY 30 P 1:55 PM  
FILED  
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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs National Wildlife Federation and Lone Tree Council allege as follows:

INTRODUCTION

1. Stephen L. Johnson, Administrator ("the Administrator") of the United States Environmental Protection Agency ("EPA"), Bharat Mathur, Acting Regional Administrator ("the Regional Administrator") of EPA Region 5, and EPA (collectively, "Defendants") failed to comply with the Federal Water Pollution Control Act ("Clean Water Act" or "the Act"), 33 U.S.C. § 1251 *et seq.*, and the Act's implementing regulations in approving (a) a variance implementation procedure promulgated by the State of Michigan, (b) a revision to the State of Michigan's water quality standards, and (c) a revision to the State of Michigan's National Pollutant Discharge Elimination System ("NPDES") program.

2. Specifically, Defendants approved Michigan's promulgation of a variance implementation procedure even though it is less protective than the variance implementation procedure prescribed by the Act and its implementing regulations.

3. In addition, Defendants approved Michigan's adoption of a multiple discharger mercury variance even though it renders the state's water quality standards and NPDES program less protective than the variance, "reasonable potential," and compliance schedule implementation procedures prescribed by the Act and its implementing regulations.

4. Plaintiffs National Wildlife Federation and Lone Tree Council (collectively, "Plaintiffs") seek the following relief:

- (a) a declaration that Defendants violated their statutory and regulatory responsibilities under the Clean Water Act,
- (b) an order reversing and remanding to Defendants their approval of the State of Michigan's variance implementation procedure and directing them to follow the steps outlined by the Act and its implementing regulations in circumstances where a Great Lakes State fails to submit an implementation procedure that is consistent with the implementation procedure prescribed by the Act and its implementing regulations,
- (c) an order reversing and remanding to Defendants their approval of the State of Michigan's revision of its water quality standards, represented by the multiple discharger mercury variance, and directing them to follow the steps outlined by the Act and its implementing regulations in circumstances where the Regional Administrator disapproves a state submission of revised water quality standards,
- (d) an order reversing and remanding to Defendants their approval of the State of Michigan's revision of its NPDES program, represented by the multiple discharger mercury variance, and

- (e) an order awarding the costs of litigation to Plaintiffs, including reasonable attorney and expert witness fees.

### **JURISDICTION AND VENUE**

5. The court has subject matter jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. §§ 1331 (federal question) and 1361 (mandamus), and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 (judicial review of administrative action).

6. The court is authorized to grant the relief requested by 28 U.S.C. § 2201 and Fed. R. Civ. P. 57 (declaratory relief); 28 U.S.C. § 2202 and Fed. R. Civ. P. 65 (injunctive relief); 5 U.S.C. § 706 (declaratory and injunctive relief); and 28 U.S.C. § 2412 (attorney fees and expenses).

7. Venue is appropriate in this judicial district pursuant to 28 U.S.C. § 1391(e) because Plaintiff Long Tree Council resides in this judicial district, a substantial part of the events or omissions giving rise to the claims occurred throughout Michigan, including in the counties served by this court, and Defendants are officers or employees of the United States and an agency of the United States.

### **PARTIES**

8. Plaintiff National Wildlife Federation ("NWF") is a nonprofit corporation organized and existing under the laws of the District of Columbia. NWF is a national organization with approximately 922,000 members nationwide, and approximately 34,000 members in Michigan. NWF's mission is to conserve natural resources and the wildlife that depends on such resources. NWF's members use and derive aesthetic enjoyment from wildlife and natural resources, including wetlands, streams, rivers, and lakes. NWF has its principal office in Virginia, and a Great Lakes office at 213 West Liberty Street, Suite 200, Ann Arbor, Michigan, 48104.

9. Plaintiff Lone Tree Council ("LTC") is a Michigan non-profit corporation based in Bay City, Michigan. LTC has approximately seventy-five members. LTC's mission is to protect and preserve Michigan's natural resources, including clean water, especially within the Saginaw River watershed, and to promote environmental justice. Lone Tree's members use and derive aesthetic enjoyment from Michigan's natural resources, including wetlands, streams, rivers, and lakes.

10. Defendants' approvals of Michigan's variance implementation procedure and multiple discharger mercury variance injured or adversely affected one or more members of Plaintiffs by (a) perpetuating the toxic pollution of Michigan streams, rivers, or lakes, which one or more members of Plaintiffs use as a source of food, for recreation, or for aesthetic enjoyment, or which they would use for such purposes but for the polluted condition of such waters or (2) increasing the likelihood that Michigan streams, rivers, or lakes will become or remain polluted by toxic substances, or (3) both, interfering with the use and enjoyment of such waters by one or more members of Plaintiffs.

11. Plaintiffs bring this action on behalf of their members. The interests of Plaintiffs' members fall within the zone of interests protected under the Clean Water Act.

12. Defendant Stephen L. Johnson is the Administrator of EPA, and is sued in his official capacity only. The Administrator is charged with the supervision and management of all EPA decisions and actions under the Act, including the approval or disapproval of state water quality standards, implementation procedures, and NPDES programs, which are the subject of this lawsuit.

13. Defendant Bharat Mathur is the Acting Regional Administrator of EPA Region 5 EPA, which has its headquarters in Chicago, Illinois, and is sued in his official capacity only. The Regional Administrator of EPA Region 5 is charged with the supervision and management

of all EPA decisions and actions in Michigan under the Act, including the approval or disapproval of state water quality standards, implementation procedures, and NPDES programs, which are the subject of this lawsuit.

14. EPA is the agency of the government of the United States responsible for the implementation of the Act, including the approval or disapproval of state water quality standards, implementation procedures, and NPDES programs, which are the subject of this lawsuit.

#### **STATUTORY AND REGULATORY BACKGROUND**

15. Congress enacted the Clean Water Act in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” and to achieve “water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water.” 33 U.S.C. § 1251(a).

16. To achieve the Act’s goal of eliminating the discharge of pollutants into navigable waters, each state must establish ambient water quality standards for intrastate waters at levels necessary to protect the “public health or welfare, enhance the quality of water and serve the purposes of” the Act. 33 U.S.C. § 1313(c)(2)(A).

17. The Act requires a state which revises or adopts a new water quality standard to submit the standard to EPA. 33 U.S.C. § 1313(c)(2); 40 C.F.R. § 131.20.

18. EPA has a non-discretionary duty to review, and approve or disapprove a new or revised water quality standard. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21. EPA must approve the standard within sixty days after the date of submission if the Agency determines that the standard meets the requirements of the Act. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(a)(1) & (b). If EPA determines that the standard is not consistent with the applicable requirements of the Act, the Agency must notify the state and specify the changes necessary to meet such requirements within ninety days after the date of submission. 33 U.S.C. § 1313(c)(3); 40 C.F.R.

§ 131.21(a)(2) & (b). EPA must promulgate a revised or new water quality standard if the state does not adopt the changes specified by the Agency within ninety days after the date of notification. 33 U.S.C. § 1313(c)(3).

19. Also to achieve the Act's goal of eliminating the discharge of pollutants into navigable waters, Congress created the National Pollutant Discharge Elimination System ("NPDES"), prohibiting the discharge of any pollutant from a point source into navigable waters unless that point source receives a permit. 33 U.S.C. §§ 1311, 1342.

20. NPDES permits must contain technology-based effluent limitations established by EPA and any more stringent limits, known as water quality-based effluent limitations ("WQBELs"), that are necessary to ensure that dischargers do not cause the quality of receiving waters to violate water quality standards. 33 U.S.C. §§ 1311, 1342.

21. Specifically, WQBELs are necessary to control pollutants which the permitting agency "determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard." 40 C.F.R. § 122.44(d)(1)(i).

22. The Act authorized EPA to delegate to the states the authority to administer the NPDES program for discharges into navigable waters within their jurisdiction. 33 U.S.C. § 1342. To be eligible for delegation, a state NPDES program (a) must have adequate authority to implement, and (b) must be administered in conformance with, the Act and its implementing regulations, including regulations governing the determination of reasonable potential, the duty to incorporate WQBELs in NPDES permits, and establishing schedules for compliance with WQBELs. *Id.*; 40 C.F.R. § 123.25(a)(15) & (38).

23. A state may revise its NPDES program. 40 C.F.R. § 123.62.

24. EPA has a non-discretionary duty to review, and approve or disapprove an

NPDES program revision based on the requirements of the Act and 40 C.F.R. Part 123. 40

C.F.R. § 123.62(b)(3).

25. Congress amended the Clean Water Act in 1990, directing EPA to publish water quality guidance (“the Guidance”) for all surface waters within the Great Lakes basin (“the Great Lakes System”). 33 U.S.C. § 1268(c)(2). Congress directed EPA to include in the Guidance “numerical limits on pollutants in ambient Great Lakes waters to protect human health, aquatic life, and wildlife, and . . . guidance to the Great Lakes States on minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System.” *Id.* at § 1268(c)(2)(A).

26. The Act requires the Great Lakes States to “adopt water quality standards, antidegradation policies, and implementation procedures for waters within the Great Lakes System which are consistent with . . . [the] guidance.” 33 U.S.C. § 1268(c)(2)(C); *see also* 40 C.F.R. § 132.3.

27. The Great Lakes States must submit to EPA the water quality standards, antidegradation policies, and implementation procedures they adopt pursuant to the Guidance. 40 C.F.R. § 132.5(a).

28. EPA has a non-discretionary duty to review, and approve or disapprove water quality standards, antidegradation policies, and implementation procedures adopted pursuant to the Guidance. 33 U.S.C. § 1268(c)(2)(C); 40 C.F.R. § 132.5(f).

29. EPA has a non-discretionary duty to promulgate water quality standards, antidegradation policies, and implementation procedures consistent with the Guidance to the extent a Great Lakes State fails to adopt them. 33 U.S.C. § 1268(c)(2)(C); 40 C.F.R. § 132.5(f)(2).

### **FACTS**

30. In 1973, EPA delegated to the State of Michigan the authority to administer the NPDES program for discharges into navigable waters within in its jurisdiction.

31. Pursuant to the 1990 amendment to the Clean Water Act, EPA established water quality criteria for mercury, which the Agency designated as a toxic pollutant and a bioaccumulative chemical of concern. 40 C.F.R. § 132.2 & Table 6; 40 C.F.R. § 401.15. EPA established a mercury water quality criterion of 1.8 nanograms per liter (“ng/l”) for protection of human health, which EPA made applicable to all waters of the Great Lakes System. 40 C.F.R. § 132.4(d)(3), Table 3 (Water Quality Criteria for Protection of Human Health). In addition, EPA established a mercury water quality criterion, or “Tier I criterion,” of 1.3 ng/l for protection of wildlife, which EPA also made applicable to all waters of the Great Lakes System. 40 C.F.R. § 132.4(d)(4), Table 4 (Water Quality Criteria for Protection of Wildlife), Appendix D.II. (“Table 4 of Part 132 ... contain[s] Tier I] criteria calculated by EPA.”).

32. The State of Michigan adopted mercury water quality criteria of 1.8 ng/l for protection of human health and 1.3 ng/l for protection of wildlife. MICH. ADMIN. CODE R § 323.1057(3), Tables 4 & 7.

33. Pursuant to the 1990 amendment to the Act, EPA promulgated guidance to the Great Lakes States on implementation procedures for the Great Lake System, including procedures for (a) granting variances to water quality standards, (b) determining reasonable potential to exceed water quality standards and incorporating WQBELs into NPDES permits, and (c) establishing schedules for complying with WQBELs. 40 CFR § 132, Appendix F – Procedure 2: Variances from Water Quality Standards for Point Sources (“Procedure 2”), Procedure 5: Reasonable Potential to Exceed Water Quality Standards (“Procedure 5”), and Procedure 9: Compliance Schedules (“Procedure 9”).



34. A Great Lakes State's procedure for granting a variance from water quality standards must "be consistent with (as protective as) the provisions in" Guidance Implementation Procedure 2. Procedure 2.

35. The State of Michigan adopted a variance implementation procedure. MICH. ADMIN. CODE R § 323.1103.

36. Michigan's variance implementation procedure is inconsistent with and less protective than Guidance Procedure 2 for the following reasons:

- (a) Michigan's variance implementation procedure does not expressly prohibit a variance for recommencing Great Lake dischargers. MICH. ADMIN. CODE R § 323.1103(1)(b).
- (b) Michigan's variance implementation procedure allows a variance to stay in effect until the NPDES permit is reissued or revoked, rather than expressly limiting the term of a variance to five years. MICH. ADMIN. CODE R. 323.1103(e).
- (c) Michigan's variance implementation procedure allows a variance if stringent technological controls would result in "*unreasonable economic* effects on the discharger and affected communities" instead of "*substantial and widespread economic and social impact.*" Compare MICH. ADMIN. CODE R § 323.1103(2)(f) with Procedure 2, § C.1.f. (emphases added).
- (d) Michigan's variance implementation procedure does not specify that renewal of a variance may be denied if the permittee did not comply with the conditions of the original variance. MICH. ADMIN. CODE R § 323.1103(8).
- (e) Michigan's variance implementation procedure allows the state to grant "multiple discharger variances." MICH. ADMIN. CODE R § 323.1103(9).

37. A Great Lakes State's procedure for determining reasonable potential to exceed water quality standards and duty to incorporate WQBELs in NPDES permits must be "consistent

with (as protective as)” the provisions in Guidance Implementation Procedure 5. Procedure 5.

38. To determine reasonable potential where representative, facility-specific effluent monitoring data samples are available, a permitting authority must follow a statistical procedure specified by Guidance Implementation Procedure 5 or an alternative statistical procedure which, among other things, accounts for limitations associated with sparse data sets. Procedure 5.

39. The State of Michigan adopted a reasonable potential implementation procedure. MICH. ADMIN. CODE R § 323.1211.

40. Michigan’s reasonable potential implementation procedure specifies that “[c]hemical-specific water quality-based effluent limits (WQBELs) shall be incorporated into a national pollutant discharge elimination system (NPDES) permit where the [state] department [of Environmental Quality] determines that a toxic substance is or may be discharged into the waters of the state at a level that has the reasonable potential to cause or contribute to an excursion above any water quality value.” MICH. ADMIN. CODE R § 323.1211.

41. Under Michigan’s reasonable potential implementation procedure, the state follows the statistical procedure for determining reasonable potential specified by the Guidance where fewer than ten representative, facility-specific effluent samples greater than the detection limit are available. MICH. ADMIN. CODE R § 323.1211(3)(b). The state follows an alternative statistical procedure for determining reasonable potential where ten or more representative, facility-specific effluent samples greater than the detection limit are available. *Id.* at Rule 1211(3)(a).

42. A Great Lakes State’s procedure for establishing compliance schedules must be “consistent with (as protective as)” Guidance Implementation Procedure 9. Procedure 9.

43. If a permit establishes a schedule of compliance which exceeds one year from the date of permit issuance or modification, the schedule shall set forth interim requirements and

dates for their achievement. Procedure 9. The time between such interim dates either (1) may not exceed one year, or (2) if the time necessary for completion of any interim requirement is more than one year and is not readily divisible into stages for completion, the permit shall require, at a minimum, specified dates for annual submission of progress reports on the status of any interim requirements. *Id.*

44. The State of Michigan adopted a compliance schedule implementation procedure. MICH. ADMIN. CODE R § 323.1217.

45. Under Michigan's compliance schedule implementation procedure, a schedule of compliance which exceeds one year from the date of permit issuance or modification must "set forth interim requirements and dates for achievement of the requirements, as appropriate." MICH. ADMIN. CODE R § 323.1217(3).

46. Michigan submitted its water quality standards, antidegradation policies, and implementation procedures to EPA.

47. On August 4, 2000, EPA approved the state's variance, reasonable potential, and compliance schedule implementation procedures, among other things. Identification of Approved and Disapproved Elements of the Great Lakes Guidance Submissions from the States of Michigan, Ohio, Indiana, and Illinois, and Final Rule, 65 Fed. Reg. 47,864, 47,866-67 (2000).

48. On May 18, 2004, Michigan submitted to EPA a multiple discharger mercury variance.

49. Michigan's multiple discharger mercury variance revises the state's water quality standards.

50. Michigan's multiple discharger mercury variance is inconsistent with and less protective than Procedure 2 for the following reasons:

- (a) Procedure 2 does not authorize the adoption of a multiple discharger variance or, in the alternative,
- (b) Contrary to Procedure 2, Michigan's multiple discharger mercury variance does not require point sources with reasonable potential to cause or contribute to an excursion above the mercury criteria to comply with an effluent limitation which represents the level currently achievable ("LCA") by the permittees at the time the variance is granted, but with an effluent limitation of 10 ng/l. *See* Procedure 2, § F.1. & 2.

51. Michigan's multiple discharger mercury variance revises the state's NPDES program.

52. Michigan's multiple discharger mercury variance is inconsistent with and less protective than Procedures 5 or 9, or both, for the following reasons:

- (a) Contrary to Procedure 5, when issuing or re-issuing a permit where the state has insufficient data to make a reasonable potential determination, Michigan's multiple discharger mercury variance authorizes the state to postpone the reasonable potential determination for as many as five years, until as many as sixty representative, facility-specific effluent samples greater than the detection limit are available.
- (b) Contrary to Procedure 5, when issuing or re-issuing a permit where the state has insufficient data to make a reasonable potential determination, Michigan's multiple discharger mercury variance does not require the state to incorporate a mercury WQBEL or LCA limitation in the permit once the state determines that the permit has the reasonable potential to cause or contribute to an excursion above the mercury Tier I criterion, but instead requires the state merely to evaluate whether to incorporate a mercury WQBEL or LCA limitation in the permit.

- (c) Contrary to Procedure 9, when re-issuing a permit without previous mercury limitations where the permit has the reasonable potential to cause or contribute to an excursion above the mercury Tier I criterion, Michigan's multiple discharger mercury variance authorizes the state to postpone compliance with a mercury WQBEL or LCA limitation until the third year of the permit, and does not require the state to set forth
- (1) interim requirements and dates for achieving them that do not exceed one year, or
  - (2) specified dates for annual submission of progress reports on the status of any interim requirement that exceeds one year.

53. On June 29, 2004, EPA approved Michigan's multiple discharger mercury variance.

54. Plaintiffs have no adequate remedy at law.

#### **FIRST CLAIM FOR RELIEF**

(EPA Approval of the State of Michigan's variance implementation procedure violated the Clean Water Act, Procedure 2, and the APA, 5 U.S.C. § 706(2)(A))

55. Plaintiffs re-allege each and every allegation contained in the foregoing paragraphs.

56. Defendants violated the Clean Water Act in approving Michigan's variance implementation procedure because the procedure is inconsistent with the Act and its implementing regulations, especially Procedure 2.

57. In approving Michigan's variance implementation procedure, Defendants acted in a manner that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A).

#### **SECOND CLAIM FOR RELIEF**

(EPA Approval of the State of Michigan's multiple discharger mercury variance violated the Clean Water Act, Procedure 2, and the APA, 5 U.S.C. § 706(2)(A))

58. Plaintiffs re-allege each and every allegation contained in the foregoing paragraphs.

59. Defendants violated the Clean Water Act in approving the revision of Michigan's water quality standards, represented by the multiple discharger mercury variance, because the revision is inconsistent with the Act and its implementing regulations, especially Procedure 2.

60. In approving the revision of Michigan's water quality standards, represented by the multiple discharger mercury variance, Defendants acted in a manner that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A).

### **THIRD CLAIM FOR RELIEF**

(EPA Approval of the State of Michigan's multiple discharger mercury variance violated the Clean Water Act, Procedure 5, and the APA, 5 U.S.C. § 706(2)(A))

61. Plaintiffs re-allege each and every allegation contained in the foregoing paragraphs.

62. Defendants violated the Clean Water Act in approving the revision of Michigan's NPDES program, represented by the multiple discharger mercury variance, because the revision is inconsistent with the Act and its implementing regulations, especially Procedure 5.

63. In approving the revision of Michigan's NPDES program, represented by the multiple discharger mercury variance, Defendants acted in a manner that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A).

### **FOURTH CLAIM FOR RELIEF**

(EPA Approval of the State of Michigan's multiple discharger mercury variance violated the Clean Water Act, Procedure 9, and the APA, 5 U.S.C. § 706(2)(A))

64. Plaintiffs re-allege each and every allegation contained in the foregoing

paragraphs.

65. Defendants violated the Clean Water Act in approving the revision of Michigan's NPDES program, represented by the multiple discharger mercury variance, because the revision is inconsistent with the Act and its implementing regulations, especially Procedure 9.

66. In approving the revision of Michigan's multiple discharger mercury variance, represented by the multiple discharger mercury variance, Defendants acted in a manner that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A).

#### **PRAYER FOR RELIEF**

Wherefore, Plaintiffs respectfully request this court to grant the following relief:

67. Declare that Defendants' August 4, 2000, decision approving the State of Michigan's variance implementation procedure violated the Clean Water Act and its implementing regulations, especially Procedure 2, and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A);

68. Declare that Defendants' June 29, 2004, decision approving the State of Michigan's revision of its water quality standards, represented by the multiple discharger mercury variance, violated the Clean Water Act and its implementing regulations, especially Procedure 2, and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A);

69. Declare that Defendants' June 29, 2004, decision approving the State of Michigan's revision of its NPDES program, represented by the multiple discharger mercury variance, violated the Clean Water Act and its implementing regulations, especially Procedure 5, and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in

violation of the APA, 5 U.S.C. § 706(2)(A);

70. Declare that Defendants' June 29, 2004, decision approving the State of Michigan's revision of its NPDES program, represented by the multiple discharger mercury variance, violated the Clean Water Act and its implementing regulations, especially Procedure 9, and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A);

71. Issue an order reversing and remanding to Defendants their approval of the State of Michigan's variance implementation procedure and directing them to follow the steps outlined by the Clean Water Act and its implementing regulations in circumstances where a Great Lakes State fails to submit an implementation procedure that is consistent with the implementation procedure prescribed by the Act and its implementing regulations;

72. Issue an order reversing and remanding to Defendants their approval of the State of Michigan's revision of its water quality standards, represented by the multiple discharger mercury variance, and directing them to follow the steps outlined by the Clean Water Act and its implementing regulations in circumstances where the Regional Administrator disapproves a state submission of revised water quality standards;

73. Issue an order reversing and remanding to Defendants their approval of the State of Michigan's revision of its NPDES program, represented by the multiple discharger mercury variance;

74. Retain jurisdiction to ensure Defendants' compliance with the court's orders;

75. Award Plaintiffs their reasonable fees, costs, expenses, and disbursements, including reasonable attorney and expert witness fees, as authorized by 28 U.S.C. § 2412; and

76. Grant Plaintiffs such further and additional relief as the court deems just and proper.



Respectfully submitted,



Neil S. Kagan  
Michigan Bar No. P58948  
National Wildlife Federation  
Great Lakes Natural Resource Center  
213 West Liberty Street, Suite 200  
Ann Arbor, Michigan 48104  
(734) 769-3351

Attorney for Plaintiffs

DATED May 30, 2006

## CIVIL COVER SHEET

County in which this action arose Bay County

JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I. (a) PLAINTIFFS

NATIONAL WILDLIFE FEDERATION; LONE TREE COUNCIL

(b) County of Residence of First Listed Plaintiff Washington, D.C.  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Neil S. Kagan, Senior Counsel  
National Wildlife Federation, Great Lakes Natural Resource Center  
213 West Liberty Street, Suite 200, Ann Arbor, Michigan 48104, (734)769-3351

## DEFENDANTS

STEPHEN L. JOHNSON, JR., ADMINISTRATOR, PLANT MATHEWS, ACTING  
REGIONAL ADMINISTRATOR; U.S. ENVIRONMENTAL PROTECTION  
AGENCY

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE

LAND INVOLVED

DAVID M. LAWSON

Attorneys (If Known)

Alberto R. Gonzales, Attorney General  
Office of the Attorney General, Department of Justice  
10th & Pennsylvania Avenue, N.W., Washington, D.C. 20530

## II. BASIS OF JURISDICTION

(Select One Box Only)

- ☐ 1 U.S. Government Plaintiff  
☒ 2 U.S. Government Defendant  
☐ 3 Federal Question (U.S. Government Not a Party)  
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES

(For Diversity Cases Only)

(Select One Box for Plaintiff and One Box for Defendant)

- |   | PTF                        | DEF                        |   | PTF                        | DEF                        |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

## IV. NATURE OF SUIT

(Select One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 IIIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition			

## V. ORIGIN

(Select One Box Only)

- ☒ 1 Original Proceeding  
☐ 2 Removed from State Court  
☐ 3 Remanded from Appellate Court  
☐ 4 Reinstated or Reopened  
☐ 5 Transferred from another district (specify)  
☐ 6 Multidistrict Litigation  
☐ 7 Appeal to District Judge from Magistrate Judgment

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing. (Do not cite jurisdictional statutes unless diversity):  
Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. Section 1251 et seq.

Brief description of cause:

Defendants approved Michigan's variance implementation procedure and a multiple discharger variance, contrary to the Clean Water Act

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

May 30, 2006

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING HT

JUDGE

MAG. JUDGE

PURSUANT TO LOCAL RULE 83.11

1. Is this a case that has been previously dismissed?

☐ Yes  
☒ No

If yes, give the following information:

Court: \_\_\_\_\_

Case No.: \_\_\_\_\_

Judge: \_\_\_\_\_

2. Other than stated above, are there any pending or previously discontinued or dismissed companion cases in this or any other court, including state court? (Companion cases are matters in which it appears substantially similar evidence will be offered or the same or related parties are present and the cases arise out of the same transaction or occurrence.)

☐ Yes  
☒ No

If yes, give the following information:

Court: \_\_\_\_\_

Case No.: \_\_\_\_\_

Judge: \_\_\_\_\_

Notes :

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